

Decision

Filed: August 27, 2013

State of Louisiana
Civil Service Commission

Docket No. S-17690

Lynette Smith

Versus

Department of Children and Family Services

Rule(s): 12.6(a)1; 13.19(s)2
Topic(s): Removal, exhaustion of sick leave; disparate treatment

Appearances: Lynette Smith, self-represented
Gail Holland, representing DCFS

Statement of the Appeal

Lynette Smith was employed by the Department of Children and Family Services (DCFS) as a Child Welfare Specialist 3, with permanent status.

By letter dated March 8, 2013, DCFS notified Ms. Smith that effective on March 16, 2013, she was being non-disciplinarily removed from her position under the provisions of Civil Service Rule (CSR) 12.6(a)1. DCFS alleges that on February 21, 2013, (the date that DCFS mailed the pre-deprivation notice to Ms. Smith) she had fewer than eight hours of sick leave and was unable to perform the essential functions of her job due to an illness or medical disability.

On April 1, 2013, Ms. Smith filed an appeal contesting her non-disciplinary removal. In her appeal, she alleges that she was injured on the job and DCFS discriminated against her based on her disability.¹ Ms. Smith further alleges that she is the victim of disparate treatment, in that another employee was allowed to use annual leave in lieu of sick leave and was not removed for exhaustion of sick leave, while Ms. Smith was not allowed to use annual leave in lieu of sick leave and was removed.

¹ The Commission lacks jurisdiction over disability discrimination claims under CSR 13.10 and *Louisiana Department of Agriculture and Forestry v. Sumrall*, 98-1587 (La. 3/2/99); 728 So.2d 1254, so this claim will not be discussed further.

I held a public hearing on June 28, 2013, in New Orleans, Louisiana. Based upon the evidence presented and pursuant to the provisions of Article X, § 12(A) of the Louisiana Constitution of 1974, as amended, I make the following findings and reach the following conclusions.

Findings of Fact

1. Lynette Smith was employed by DCFS as a Child Welfare Specialist 3, with permanent status. She was assigned to the Child Protection Investigation program and her supervisor was Trina Washington, Program Operations Manager.
2. On December 27, 2011, Ms. Smith sustained an on-the-job injury. She applied for and was granted Family and Medical Leave Act (FMLA) leave due to her injury. Ms. Smith was continuously absent from work because of her injury until the effective date of her removal on March 16, 2013.
3. Ms. Smith exhausted her FMLA leave entitlement on March 29, 2012.
4. In October 2012, DCFS changed its agency policy to provide that employees who had exhausted their FMLA entitlement and sick leave would only be allowed to use four (4) weeks of compensatory (straight time or time and one-half) leave or annual leave prior to their removal under CSR 12.6(a)(1).
5. In December 2012, Ms. Smith exhausted her sick leave and began using her compensatory leave.
6. By letter dated February 7, 2013, DCFS notified Ms. Smith that she had 6.464 hours of sick leave and that she must begin using her annual leave in lieu of sick leave, or she would be placed on leave without pay and removed from her position under CSR 12.6(a)1.
7. By letter dated February 7, 2013, DCFS notified Shereka Lewis, Child Welfare Specialist 3, that she had 5.536 hours of sick leave and that she must begin using her annual leave in lieu of sick leave for her continuing absence from work. Ms. Lewis saw her doctor on February 17, 2013, and was released to return to full duty and did so on March 1, 2013.
8. By letter dated February 12, 2013, Ms. Smith requested that DCFS allow her to use her annual leave in lieu of sick leave.
9. On February 21, 2013, Ms. Smith was absent from work and on compensatory leave in lieu of sick leave, as she had exhausted her sick leave and had not been released by her doctor to return to work. DCFS mailed Ms. Smith a pre-removal letter proposing her removal under CSR 12.6(a)1, as she had fewer

than eight hours of sick leave and was unable to perform the essential functions of her job due to an illness or medical condition.

10. On February 27, 2013, Ms. Smith responded to the February 21, 2013 pre-removal letter. In her response, she states that she was injured on the job and that DCFS was buying back her sick leave due to her worker's compensation claim. Ms. Smith also requests to use annual leave in lieu of sick leave, and admits she had fewer than eight (8) hours of sick leave and that DCFS had allowed her to use her compensatory leave in lieu of sick leave since December of 2012.
11. By letter dated March 8, 2013, DCFS removed Ms. Smith from her position effective March 16, 2013, under the provisions of CSR 12.6(a)1.

Discussion and Conclusions of Law

DCFS removed Ms. Smith under the provisions of CSR 12.6(a)1, which states as follows:

12.6 Non-disciplinary Removals.

(a) An employee may be non-disciplinarily removed under the following circumstances:

- 1. When, on the date the notice required by Rule 12.7 is mailed, hand delivered, or orally given, the employee is unable to perform the essential functions of his job due to illness or medical disability and has fewer than eight hours of sick leave. An employee removed under this provision shall be paid for all remaining sick leave.*

The grounds listed in Rule 12.6(a)1 constitute legal cause for separation. *Bradford v. Department of Hospitals*, 255 La. 888, 233 So.2d 553 (1970). Likewise, this rule can be used even when the medical disability results from an injury on the job. *Dickson v. Department of Highways*, 234 La. 1082, 102 So.2d 464 (1958) [termination reversed for other reasons].

On February 21, 2013, (the date that DCFS mailed the pre-removal letter to Ms. Smith), she had fewer than eight hours of sick leave; in fact, the evidence shows that she had completely exhausted her sick leave and was on compensatory leave. Moreover, it is clear that Ms. Smith was unable to perform the essential functions of her job due to her injury, as she admits that she was absent from work on February 21, 2013, and that on that day she had not been released to return to work by her doctor.

At the hearing, Ms. Smith contended that DCFS inaccurately calculated her sick leave balance. However, I find this contention without merit, as the only evidence offered by

Ms. Smith in support of it was her own self-serving testimony. DCFS has proved that Ms. Smith's removal was proper under CSR 12.6(a)1.

Ms. Smith also claims that she is the victim of disparate treatment, which is a form of non-merit factor discrimination. Under CSR 13.19(s)2, Ms. Smith has the burden of proof on this claim.

Her disparate treatment claim is based on her allegation that Ms. Lewis was not removed despite having a sick leave balance of less than eight hours and that she was allowed to use annual leave in lieu of sick leave. While these allegations are true, Ms. Lewis obtained a doctor's release to return to full duty and returned to work on March 1, 2013; Ms. Smith did not, and Ms. Smith was allowed to use compensatory leave in lieu of sick leave from December 2012, until her removal. I thus conclude that Ms. Smith failed to prove that she is the victim of disparate treatment.

On the date that DCFS gave Ms. Smith the pre-removal letter, she had fewer than eight hours of sick leave and was unable to perform the essential functions of her job due to illness or medical disability. Based upon the foregoing reasons, I find that DCFS proved Ms. Smith's removal was in accordance with the provisions of CSR 12.6(a)1.

Accordingly, this appeal is hereby denied.

Roxie F. Goynes
Civil Service Commission Referee